

# State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice

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## I. INTRODUCTION

Fully contested civil litigation typically ends with the entry of a judgment in favor of one of the combatants.<sup>1</sup> In some situations, one of the parties, anticipating the eventual result, may wish to voluntarily terminate the proceedings by offering a judgment to the other side. Federal Rule of Civil Procedure 68 provides for this option and further directs the shifting of “costs” when a plaintiff rejects an offer from the defendant that is more favorable than the result at trial.<sup>2</sup> The rule as it stands is intended to

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<sup>1</sup> See FED. R. CIV. P. 58.

<sup>2</sup> FED. R. CIV. P. 68 states:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

FED. R. CIV. P. 68.

promote settlement,<sup>3</sup> and to further that end there have been numerous proposals since the early 1980s to amend Rule 68,<sup>4</sup> accompanied by an outpouring of academic commentary.<sup>5</sup>

Yet seldom has so much talk resulted in so little action. Despite (or perhaps because of) the cacophony of voices, Federal Rule 68 remains unchanged. It is unclear what the fuss is all about. Even in its present form, the option provided by Rule 68 is apparently rarely used.<sup>6</sup> Indeed, there is

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<sup>3</sup> See *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

<sup>4</sup> See Part II *infra* for a detailed discussion of these proposals.

<sup>5</sup> For a sample of the literature see, e.g., Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425 (1986); Joshua P. Davis, *Toward A Jurisprudence of Trial and Settlement: Allocating Attorney's Fees by Amending Federal Rule of Civil Procedure 68*, 48 ALA. L. REV. 65 (1996); John E. Sprizzo, *Unjustifiable Refusals to Settle and Rule 68*, 62 ST. JOHN'S L. REV. 443 (1988); Richard Mincer, Note, *Rule 68 Offer of Judgment: Sharpen the Sword for Swift Settlement*, 25 U. MEM. L. REV. 1401 (1995). A lengthier list of citations is found in Davis, *supra*, at 70 n.21. More articles are cited in Part II, *infra*.

<sup>6</sup> See Edward H. Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, in REFORMING THE CIVIL JUSTICE SYSTEM 108, 108 (Larry Kramer ed., 1996) ("Rule 68 has been viewed by many, including me, as an uninteresting provision that remains on the fringe of procedure because it has been little used to scant effect."). See also Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 102 F.R.D. 407, 433 (1984) (remarking that Rule 68 is seldom used) [hereinafter 1984 Proposal]; Tai-Yeong Chung, *Settlement of Litigation Under Rule 68: An Economic Analysis*, 25 J. LEGAL STUD. 261, 261 (1996) (commenting that Rule 68 is seldom used); Keith N. Hylton, *Rule 68, The Modified British Rule, and Civil Litigation Reform*, 1 MICH. L. & POL'Y REV. 73, 76 (1996) (noting the infrequent use of Rule 68).

Almost all of the above accounts appear to draw conclusions based on largely anecdotal evidence. However, the only rigorous survey of attorneys on the use of the present federal rule essentially comes to the same conclusions. See JOHN E. SHAPARD, *LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE* (1995). This study, based on written questionnaires returned from a scientific sampling of attorneys who litigated federal civil cases (*see id.* at 3–5 (describing survey)), found that in civil rights cases, only 4% settled by way of an accepted Rule 68 offer, but offers were made but not accepted in 20% of cases that settled anyway, and in 12% of cases that were tried. *See id.* at 8–9. In those two categories of cases, 61% and 85% of the surveyed attorneys, respectively, indicated that Rule 68 had no effect on any settlement discussions. *See id.* See also Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 222–225 (1997) (interviews of civil rights lawyers

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

apparently some sentiment among the federal rulemakers to discard Rule 68 entirely.<sup>7</sup> At the very least, no immediate change to Federal Rule 68 appears in the offing.<sup>8</sup>

Given the overproduction of scholarship on and the underproduction of actual change to Rule 68, we hesitate to add still more to the scholarly debate. But we nonetheless do so for two reasons. First, almost all of the commentary virtually ignores the statutory or rule provisions in *state* courts governing the use of offers of judgment in those forums.<sup>9</sup> Those provisions are a potential source of insight on the nature of offers of judgments themselves and on whether reform at the federal level is necessary or appropriate. A second related reason is that we conclude that upon review of the bewildering number of reform proposals, less is more. We think reform of Federal Rule 68 is called for, but we advocate a relatively simple, stripped-down version which avoids many of the controversial provisions that weigh down most current proposals. Our proposal can be rightly criticized for its modesty, but we think incremental reform is optimal and has the most realistic chance to come into being.

This Article proceeds as follows: Part II summarizes the controversy over Federal Rule 68 since the early 1980s and reviews the numerous unsuccessful efforts to amend the rule. In Part III, we turn to the experience in the states. There, we find a mix of experimentation. Many states utilize the current federal model; others have pursued innovations, some of which resemble the failed reform proposals for the federal rule; and still others have declined to regulate offers of judgment at all. In Part

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showed Rule 68 not to be a major factor in practice).

<sup>7</sup> E-mail from Edward Cooper, Reporter to the Advisory Committee on Civil Rules, United States Judicial Conference, to Michael E. Solimine (Feb. 26, 1996) (on file with authors).

<sup>8</sup> *See id.*

<sup>9</sup> *See, e.g.,* Chung, *supra* note 6, at 261 n.1 (referring in passing to “[s]everal states” having adopted a rule “similar” to FED. R. CIV. P. 68, but giving no examples). For rare examples of explicit discussions of state provisions, see SHAPARD, *supra* note 6, at 25–27 (reprinting provisions of Michigan, Florida, Nevada, California, Wisconsin and Pennsylvania); David A. Bell, *Offers of Judgment Under Federal Rule of Civil Procedure 68*, 11 OHIO LAW. 14, 15 (May/June 1997) (discussing state provisions); Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 422–426 (1997) (discussing provisions of California, Connecticut and Oklahoma); Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1585 & n.167–1587 (1994) (listing several such provisions with discussion of their use).

IV, we consider both explanations for innovations on this issue in the states and the implications of state practice for change at the federal level. Part IV also revisits and critiques the latest proposals to amend the federal rule. We conclude with a brief defense of our own proposal to regulate offers of judgment.

## II. A BRIEF HISTORY OF FEDERAL RULE 68

The purpose of Federal Rule 68 is to encourage settlements and avoid protracted litigation.<sup>10</sup> Rule 68 permits a party defending against a claim to make an offer of judgment, thereby precluding plaintiff's ability to make use of the provision unless the plaintiff is being countersued. If the offer is rejected, and the eventual judgment is less favorable to the plaintiff than the offer, the defendant is entitled to its post-offer costs. For purposes of Federal Rule 68, these costs do not include attorney's fees or expert witness fees unless the particular statute under which the cause of action arises contemplates such a remedy for a violation.<sup>11</sup> A judgment entered upon an acceptance of an offer made under Rule 68 acts as a resolution of the liability of the defendant and has both *res judicata* and collateral estoppel effects upon the plaintiff's claims.<sup>12</sup> This particular type of

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<sup>10</sup> See 12 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3001, at 66 (1982) (explaining that the purpose of Rule 68 is to encourage settlement). See also *Marek v. Chesny*, 473 U.S. 1, 11 (1985).

For purposes of this Article we assume that it is sound policy to encourage settlements. This is, of course, not an uncontroversial proposition. Compare Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlement should be discouraged in certain types of public law litigation) with Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995) (contesting Fiss's position).

<sup>11</sup> See *Marek*, 473 U.S. at 11. Prior to the *Marek* decision, at the federal level, attorney's fees were never subsumed in the definition of costs. In dissent, Justice Brennan vehemently disagreed with the majority's proposition that the awarding of attorney's fees under "costs" was intended by Congress, specifically arguing that the drafters of the Federal Rules intended "costs" to mean only taxable costs traditionally allowed under the common law. See *id.* at 18 (Brennan, J., dissenting). He also cited eleven different provisions within the Federal Rules that specifically authorize courts to award attorney's fees as "expenses," not "costs," suggesting that the drafters intended something other than the majority's interpretation of Rule 68 "costs." See *id.* at 20 (Brennan, J., dissenting).

<sup>12</sup> See Gregory P. Crinion, *Offers of Judgment: The Federal Rule*, 65 WIS. LAW.

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

provision was entirely new at the federal level, but several states had already implemented offer of judgment statutes which the Advisory Committee used as guideposts for Federal Rule 68.<sup>13</sup>

Rule 68 was thought to encourage settlement and avoid litigation because the claimant would still recover costs if the judgment entered was more than the offer. At the same time, the defending party could be free of the case by offering an accepted settlement, or could be rewarded with costs if the judgment entered was less favorable to the plaintiff than the defendant's unaccepted offer. Thus, a leading treatise stated that Rule 68 was of "great benefit" to courts because of the diminished burden of litigation.<sup>14</sup> However, the goal of encouraging settlement and discouraging litigation has been questioned by some commentary.<sup>15</sup> At a visceral level, these commentators believe that the twin goals behind Rule 68 are contrary to the substantive right, created by the Constitution or the Congress, of access to the courts where particular jurisdiction to hear a matter, such as public law litigation, has been conferred on a court.<sup>16</sup>

Because Federal Rule 68 has not been widely utilized by practitioners, the overwhelming majority of the commentary and the Federal Rules Advisory Committee have determined that Federal Rule 68 has not been effective in achieving its intended purpose.<sup>17</sup> According to the Advisory

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25, 30 (1992).

<sup>13</sup> See FED. R. CIV. P. 68 advisory committee's note, reprinted in 12A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 577 (1982). Federal Rule 68 was modeled after 2 MINN. STAT. § 9323 (Mason 1927). See *id.*

<sup>14</sup> 12 WRIGHT ET AL., *supra* note 10, § 3001, at 67.

<sup>15</sup> See, e.g., Burbank, *supra* note 5, at 426; Fiss, *supra* note 10, at 1074.

<sup>16</sup> See Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1386 (1985) (book review). Professor Redish argues that federal courts have been provided jurisdiction for a particular reason, which in comparison to the need to relieve dockets, imposes too much of a cost to society. See *id.* See also Burbank, *supra* note 5, at 436-437.

<sup>17</sup> See proposed FED. R. CIV. P. 68 advisory committee's note (on the 1983 proposed Amendment), reprinted in 98 F.R.D. 337, 363 (1983). The law review commentary has been no different. See, e.g., David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 J. LEGAL STUD. 225, 226 (1994); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 7-8 (1985) [hereinafter Simon, *The Riddle of Rule 68*]; Roy D. Simon Jr., *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889, 891 (1984) [hereinafter Simon, *Rule 68 at the Crossroads*]; Sprizzo, *supra* note 5, at 445; Mincer, *supra* note 5.

Committee, Rule 68 is ineffective for two principal reasons: (1) the actual costs sanction, except in civil rights cases where attorney's fees are defined, was an insufficient incentive to motivate the parties to use the rule; and (2) that the rule was available only to the party defending against a claim and not to claimants, thus, effectively preventing plaintiffs from invoking Rule 68.<sup>18</sup> In response to this perceived ineffectiveness, the Advisory Committee proposed amendments to Rule 68 in both 1983 and 1984.

In the 1983 proposal to amend Rule 68, the Advisory Committee specifically articulated its purpose for Rule 68—to foment the process of settlement.<sup>19</sup> The 1983 proposal revised Rule 68 to permit all parties, including claimants, to make offers of settlement, and altered the earlier provision that the offer be made at least ten days before trial to at least thirty days before trial.<sup>20</sup> The Advisory Committee felt that the ten day period was too short to enable many offerees to act upon offers put forth by offerors. Furthermore, the Advisory Committee expanded the definition of costs to include attorney's fees from the date of the offer. Specifically, the addition of attorney's fees within the definition of costs was intended to increase the risk factor faced by an offeree and was expected to encourage serious deliberation of an offer at an earlier stage of the process, which would then dispose of cases before the major litigation costs accrued.<sup>21</sup> The assessment of attorney's fees was left to the judge's discretion to the extent that the trial court found an award of attorney's fees as "unjustified" or "excessive."<sup>22</sup> However, any offer made in bad faith by the offeror, as

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<sup>18</sup> See proposed FED. R. CIV. P. 68 advisory committee's note, *supra* note 17, at 363.

<sup>19</sup> See *id.* at 364.

<sup>20</sup> See *id.* at 365–366. This change reflected the notion that parties should be given enough time to consider settlement after sufficient discovery but far enough in advance of trial to avoid litigation. See *id.* at 365. The amended provision also extended to 30, from 10 the number of days the offeree had to accept the offeror's proposal. See *id.*

<sup>21</sup> See proposed FED. R. CIV. P. 68 advisory committee's note, *supra* note 17, at 364.

<sup>22</sup> See *id.* The Advisory Committee wanted to avoid a mandatory attorney's fees provision because the harshness of the imposition would impose a heavy award of expenses against an offeree under all the circumstances. See *id.* The court was instructed to exercise discretion and evaluate certain factors which would aid its evaluation as to whether the attorney's fees penalty would be proper for the particular case at bar. See *id.*

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

determined by the court, would not merit an award of costs or expenses.<sup>23</sup>

The 1983 proposal received heavy criticism and was eventually withdrawn by the Advisory Committee.<sup>24</sup> Most of the criticism arose from attorneys representing civil rights litigants who feared that implementation of proposed Rule 68 would have a chilling effect on civil rights litigation, either deterring litigation or forcing premature, deficient settlements of actions.<sup>25</sup> In turn, this perceived chilling effect would conflict with the policy of fee shifting statutes specifically designed by Congress to encourage meritorious civil rights litigation.<sup>26</sup> Other plaintiffs' lawyers argued that the 1983 proposal would destroy the contingency fee system, forcing the attorney to warn the potential litigant that the plaintiff might be required to pay defendant's attorney's fees if the plaintiff rejected a settlement offer and then lost at trial.<sup>27</sup> One commentator argued that the proposal would place attorneys in the unenviable position of advising a client whether to accept the settlement offer on the basis of the potential Rule 68 sanction rather than the merits of the offer.<sup>28</sup>

One glaring deficiency of the 1983 proposal was the potential for collateral litigation generated on the issue of whether a judge correctly imposed or refused to impose attorney's fees as part of costs in a particular case.<sup>29</sup> Ironically, a rule that was specifically created to encourage settlement and avoid litigation would, instead, create collateral litigation on the issue of the imposition of attorney's fees when the actual original claim

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<sup>23</sup> See *id.* at 362. The purpose of this provision is to prevent a defending offeror from making a reckless offer that the offeror knows the offeree will never accept. See *id.* This issue of bad faith is to be determined objectively on the basis of the all the facts surrounding the circumstances of the case. See *id.* at 367.

<sup>24</sup> See 1984 Proposal, *supra* note 6, at 432–437.

<sup>25</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 14–15; Janice Toran, *Settlement, Sanctions, and Attorney Fees: Comparing English Payment Into Court and Proposed Rule 68*, 35 AM. U. L. REV. 301, 305 (1986).

<sup>26</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 14–15. Also, some commentators argued that the 1983 proposal would violate the Rules Enabling Act by abridging or modifying the substantive right to attorney's fees. See *id.* See also Burbank, *supra* note 5, at 434–435. But see *Marek v. Chesny*, 473 U.S. 1, 7 (1985).

<sup>27</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 14. While the court still would possess the discretion as to whether to include attorney's fees, no lawyer could assure the client that the court would use that discretion to the benefit of the client. See *id.*

<sup>28</sup> See Toran, *supra* note 25, at 305–306.

<sup>29</sup> See *id.* at 312.

had been settled.<sup>30</sup>

In response to the criticism of the 1983 proposal, the Advisory Committee the next year offered another proposal to placate the concerns expressed under the 1983 proposal. Again, the Advisory Committee cited its finding that in its present form, Rule 68 had "rarely" been invoked and had been considered "largely ineffective" as a means of achieving the goals of avoiding litigation and encouraging settlement.<sup>31</sup> In a major departure from the 1983 proposal, the 1984 proposal abandoned the monetary comparison between the offer and the final judgment, replacing it with a flexible standard that asked whether the offer was unreasonably rejected.<sup>32</sup> Even if a court determined that an offer was rejected unreasonably, the 1984 proposal granted the court broad ranging discretion to devise "an appropriate sanction" for the offeree. Thus, post-offer attorney's fees would not automatically be shifted, but as the Advisory Committee specifically provided, Rule 68 sanctions could include attorney's fees in the appropriate context.<sup>33</sup> The new amendment also provided certain factors that the judge was to evaluate to make sure that the award was neither excessive nor insufficient; however, the discretion granted to the trial court could not be used in a manner that would defeat the purposes of the rule.<sup>34</sup> This discretion to create an "appropriate sanction" also allowed a plaintiff-offeree to recover attorney's fees pursuant to the statute under which her claim arose even if she had rejected a more favorable offer. The 1984 proposal also granted discretion to the court to impose sanctions where the plaintiff-offeree rejected an offer of settlement, and subsequently, was awarded nothing at trial.<sup>35</sup>

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<sup>30</sup> See 1984 Proposal, *supra* note 6, at 436.

<sup>31</sup> *Id.* at 433.

<sup>32</sup> See *id.* at 435. The 1984 proposal also narrowed the window of time that offers could be made requiring a wait of at least 60 days after service of the summons and complaint, and not less than 90 days before trial. See *id.* at 434. Further, the 1984 proposal allowed an offeree 60 days in which to accept or reject an offer or counteroffer. See *id.*

<sup>33</sup> See *id.* at 434-435.

<sup>34</sup> See *id.* at 436. The intended effect of the amendment was to subject an offeree, who had acted unreasonably and caused needless delay and increase in the cost of the litigation, to be subject to an appropriate sanction by the court. See *id.*

<sup>35</sup> See *id.* at 436-437. See generally *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981) (holding that Rule 68 sanctions only apply when a plaintiff is awarded a judgment that is less than the defendant's offer, not when plaintiff is awarded nothing at all).



## STATE COURT REGULATION OF OFFERS OF JUDGMENT

Because the 1983 proposal was criticized in large part due to its mandatory imposition of fee shifting when the judgment finally obtained was less favorable to the offeree than the offer, the 1984 provision vested discretion in the trial court as to the issue of the imposition of costs on the offeree.<sup>36</sup> However, the 1984 proposal was received with as much consternation as its 1983 counterpart, especially from the civil rights bar.<sup>37</sup> Critics also raised the new argument that the 1984 proposal would lead to an intolerable amount of collateral litigation, over both the unreasonableness of rejections and the appropriateness of particular sanctions.<sup>38</sup> Opponents charged that the proposal would threaten the attorney-client privilege and the work-product doctrine, because determining whether a rejection was unreasonable would often entail an inquiry into both the attorney's discussions with her client and the attorney's evaluation of the case.<sup>39</sup> Furthermore, the opponents argued that any evaluation of the reasonableness of the refusal to accept an offer could conflict with the client's specific wishes, poignantly so in cases where the plaintiff was seeking injunctive or declaratory relief that would not be so easily quantified.<sup>40</sup> Finally, critics charged that investing the judge with the ability to tailor an "appropriate sanction" would bestow a newfound power to trial courts over litigants, effectively coercing settlements before trial by threatening sanctions before trial, or punishing litigants egregiously after

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<sup>36</sup> See 1984 Proposal, *supra* note 6, at 436-437.

<sup>37</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 17-18; Sprizzo, *supra* note 5, at 447-448; Toran, *supra* note 25, at 306.

<sup>38</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 18; Sprizzo, *supra* note 5, at 447-448. Critics cited the difficulty of determining both the amount of relief that might reasonably have been expected if the claimant prevailed and the appropriate sanction on the offeree; determinations that might well lead to a second round of litigation in each case.

<sup>39</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 18-19. Professor Simon argued that clients unwilling to risk revelation of their secrets might cease to be fully candid with their attorney, thereby undercutting the fundamental rationale for the attorney-client privilege. See *id.*

<sup>40</sup> See Thomas L. Cabbage, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465, 471 (1991). Cabbage articulates that the "inherent unquantifiability of nonpecuniary injunctive relief" for all practical purposes makes the applicability of Rule 68 impossible. *Id.* (quoting *Spencer v. General Elec. Co.*, 894 F.2d 651, 661 (4th Cir. 1990)); see, e.g., *Spencer*, 894 F.2d at 664. The *Spencer* court applied Rule 68 to equitable relief over the plaintiff's objection.

trial.<sup>41</sup>

The controversy over the 1984 proposals had barely subsided when the Supreme Court decided *Marek v. Chesny*.<sup>42</sup> In *Marek*, the father of a boy who had been shot and killed by the police brought a cause of action under 42 U.S.C. § 1983, and a number of state tort law claims.<sup>43</sup> Prior to trial, a Rule 68 offer was made to the plaintiff for a sum of \$100,000, which the plaintiff did not accept.<sup>44</sup> Subsequently, the jury returned a verdict of \$5,000 on the state law claim, \$52,000 for the § 1983 action and \$3,000 in punitive damages.<sup>45</sup> The trial court was subsequently faced with the conflict between awarding costs to the prevailing plaintiff under 42 U.S.C. § 1988, or upholding the defendant's Rule 68 motion awarding costs when the judgment finally obtained by the plaintiff was less favorable than the settlement offer. In the trial court's estimation, attorney's fees could be shifted to the defendant in this particular case because the section 1988 action defined attorney's fees as costs. However, the Seventh Circuit, in an opinion by Judge Richard Posner, reversed the trial court holding on grounds that echoed the criticisms voiced by commentators who had expressed opposition to the 1983 and 1984 proposals.<sup>46</sup>

The United States Supreme Court reversed. An opinion by Chief Justice Warren Burger explained that the drafters of Rule 68 were aware of numerous federal statutes defining attorney's fees as part of court costs and that the drafters must have intended for Rule 68 costs to include attorney's

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<sup>41</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 19. Professor Simon argued that the sanctions would further chill the enforcement of civil rights and penalize zealous advocacy.

<sup>42</sup> 473 U.S. 1 (1985).

<sup>43</sup> See *id.* at 3.

<sup>44</sup> See *id.* at 3-4.

<sup>45</sup> See *id.* at 4. Plaintiff then filed a request for attorney's fees under 42 U.S.C. § 1988, which provides that a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." *Id.*

<sup>46</sup> See *Chesny v. Marek*, 720 F.2d 474, 480 (7th Cir. 1983), *rev'd* 473 U.S. 1 (1985). Judge Posner argued that neither the history of Rule 68 nor § 1988 revealed any intent to include attorney's fees as costs. See *Chesny*, 720 F.2d at 479. Secondly, Judge Posner stated that the use of Rule 68 in this manner would frustrate the congressional purpose of encouraging meritorious civil rights actions. See *id.* Finally, he argued that allowing Rule 68 to cut off attorney's fees violated the Rules Enabling Act by abridging the plaintiff's substantive rights to attorney's fees under § 1988. See *id.*

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

fees whenever an applicable statute defines attorney's fees as costs.<sup>47</sup> The Court also rejected the argument that using Rule 68 as a cost-shifting device would discourage civil rights litigation.<sup>48</sup> Finally, the Court reasoned that Rule 68's clear policy favored settlements of all lawsuits and civil rights plaintiffs deserved no more protection than any other type of plaintiff.<sup>49</sup>

In a vehement dissent, Justice William Brennan castigated the majority for its interpretation on the interplay between Rule 68 and § 1988. Justice Brennan argued that the majority's interpretation conflicted with the drafter's intentions, defining costs to mean only taxable costs traditionally allowed at common law.<sup>50</sup> Furthermore, he stated that the majority's interpretation would violate the Rules Enabling Act and improperly infringe upon the province of Congress without prior justification.<sup>51</sup> Finally, Justice Brennan cited the Court's failure to submit any authority for the proposition that courts or attorneys defined the cost-shifting provisions of Rule 68 as including attorney's fees.<sup>52</sup>

The reaction to *Marek* was explosive. Professor Roy Simon analogized Rule 68 to a "sleeping giant which the Supreme Court had awakened by virtue of its decision."<sup>53</sup> Other commentators, in both the academic journals and the literature of the practicing bar, predicted that defendants would make offers of judgment more frequently due to the rule's increased notoriety.<sup>54</sup> Some argued that the *Marek* interpretation of Rule 68 would induce the Judicial Conference or Congress into amending the rule because

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<sup>47</sup> See *Marek*, 473 U.S. at 5. For the Court, all costs properly awardable in an action are to be considered within the scope of Rule 68 costs. In order to hold differently, Congress had to expressly indicate its intention to the contrary. See *id.*

<sup>48</sup> See *id.* at 9. The Court cited the fact that many civil rights plaintiffs would receive greater compensation in settlement than they would have received at trial. See *id.* at 10.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* at 18–19 (Brennan, J., dissenting). Justice Brennan further cited eleven specific provisions in the Federal Rules where attorney's fees are specifically mentioned. Rule 68, he pointed out, was not one of those provisions. See *id.* at 20.

<sup>51</sup> See *id.* at 22.

<sup>52</sup> See *id.* at 20.

<sup>53</sup> Roy D. Simon, Jr., *The New Meaning of Rule 68: Marek v. Chesny and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475, 476–477 n.2–3 (1986).

<sup>54</sup> See Cabbage, *supra* note 40, at 467. Cabbage also argues that *Marek*'s potential attorney's fees award greatly increases the attractiveness of offers of judgments for defendants. See *id.*

the Supreme Court (in this view) radically altered its provisions.<sup>55</sup> And Justice Brennan, dissenting in *Marek*, specifically called for judicial conference or congressional action to resolve the newly created problem.<sup>56</sup> However, twelve years have passed, and Federal Rule 68 remains unamended in the form criticized by the Advisory Committee.<sup>57</sup>

Commentators have continued to devote attention to these, and other, proposals to modify Rule 68. Indeed, a near cottage industry has arisen among economists to examine the workings of various proposals.<sup>58</sup> The conventional wisdom among economists is that the present Federal Rule either has little effect on or perhaps decreases the settlement rate. The reason is that the rule only awards costs, which are usually relatively small and far less than incurred attorney's fees. While the rule seemingly increases the defendant's incentive to make realistic settlement offers, the effect may be static since it potentially makes litigation more costly to the plaintiff, even if she wins, and the defendant may thus offer less in settlement.<sup>59</sup> To combat the disincentives of the present rule, some

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<sup>55</sup> See Simon, *The Riddle of Rule 68*, *supra* note 17, at 23.

<sup>56</sup> See *Marek*, 473 U.S. at 42 (Brennan, J., dissenting).

<sup>57</sup> This does not mean that official federal action has been entirely absent. The United States District Court for the Eastern District of Texas has promulgated, as a local rule, an offer of judgment provision that allows both parties to make an offer, and imposes litigation costs on the offeree if the final judgment is of more benefit to the offeror by 10%. See *Friends of the Earth v. Chevron Chemical Co.*, 885 F. Supp. 934 (E.D. Tex. 1995) (upholding validity of this rule despite conflict with Rule 68 on basis that the Civil Justice Reform Act of 1990 permits local deviation from the Federal Rules). See generally Craig Madison Patrick, Comment, *The Offer You Can't Refuse: Offers of Judgment in the Eastern District of Texas*, 46 BAYLOR L. REV. 1075 (1994). Recently, the Fifth Circuit invalidated this local rule on the basis that it was not authorized by the Civil Justice Reform Act. See *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261 (5th Cir. 1997).

Likewise, one of the provisions of the "Contract With America" in the 104th Congress would have extensively amended Federal Rule 68 by, inter alia, permitting any party in diversity cases to make such offers and provide for the shifting of attorney's fees under certain circumstances. See H.R. 988, 104th Cong. § 2 (1995) (amending 28 U.S.C. § 1332), reprinted in Davis, *supra* note 5, at 79 n.51. The measure passed the House of Representatives, but no further action was taken in the Senate during the 104th Congress.

<sup>58</sup> See Hylton, *supra* note 6, at 76 (stating that while "seldom used by attorneys," Rule 68 is a "popular subject . . . for economists interested in analyzing litigation incentives.").

<sup>59</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 574-576 (4th ed. 1992)

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

economists have argued that, to varying degrees, any party should be able to invoke the rule, costs should include attorney's fees or that post-offer costs should be paid to a third party, like the court.<sup>60</sup>

In contrast to the mostly theoretical work of economists, Professor Thomas Rowe reported a "dearth of empirical work" on the topic in 1988,<sup>61</sup> a position he reiterated in 1995.<sup>62</sup> This literature provides some support for the conventional wisdom that Federal Rule 68 is, in fact, little used,<sup>63</sup> due in part to the difficulties in understanding and applying the present rule.<sup>64</sup> Controlled experiments with lawyers and law students using different versions of the present rule have come to varying conclusions,<sup>65</sup> but they do suggest that Rule 68 would have a more robust impact on settlement if attorney's fees, as well as other costs, were subject to being shifted.<sup>66</sup>

### III. THE STATE EXPERIENCE

Discussion of civil procedure in state courts typically starts with an analysis of those states that have used the Federal Rules as a model, and so shall we. As described in Professor John Oakley's leading article,<sup>67</sup> twenty-

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(general discussion); 12 WRIGHT ET AL., *supra* note 10, § 3001, at 69 (summarizing economic literature); Chung, *supra* note 6, at 262-263 (same).

<sup>60</sup> See Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, in REFORMING THE CIVIL JUSTICE SYSTEM, *supra* note 6, at 13-37 (summarizing and analyzing these proposals); Chung, *supra* note 6 (advancing payment to third party proposal); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93 (1986) (advancing, inter alia, a proposal to permit plaintiff or defendant to make an offer of judgment).

<sup>61</sup> Thomas D. Rowe, Jr. with Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, LAW & CONTEMP. PROB., Autumn 1988, at 13, 19.

<sup>62</sup> See David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 CHI.-KENT L. REV. 519, 520 (1995).

<sup>63</sup> See generally SHAPARD, *supra* note 6.

<sup>64</sup> See *id.*; see also Rowe with Vidmar, *supra* note 61, at 30.

<sup>65</sup> See, e.g., Anderson & Rowe, *supra* note 62, at 534 (showing that the authors' survey indicated, inter alia, that a two-sided fee-shifting rule would not substantially affect settlement rate).

<sup>66</sup> See Thomas D. Rowe, Jr. & David A. Anderson, *One-Way Fee Shifting Statutes and Offer of Judgment Rules: An Experiment*, 36 JURIMETRICS J. 255, 273 (1996).

<sup>67</sup> John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey*

two states, plus the District of Columbia, essentially replicate (with relatively minor exceptions) the Federal Rules,<sup>68</sup> while another thirteen states have, by rule or statute, substantially followed the federal model.<sup>69</sup> The remaining states use procedural regimes not substantially similar to the federal model.<sup>70</sup>

The states are thus not unanimous in following the federal model, and the same is true for offer of judgment provisions. By our account,<sup>71</sup> about twenty-eight states (including a majority of the federal replica jurisdictions), plus the District of Columbia, have provisions identical or substantially similar to Federal Rule 68. Another thirteen states have provisions which depart from the Federal Rule in significant ways, while nine states apparently have no provision at all. In the latter states, presumably, the parties can still make offers of judgment, but a failure to accept carries no adverse consequences under any circumstances.

The states that depart from the Federal Rule appear to have been motivated, at least in part, by some criticisms of Rule 68. As noted above, those criticisms have included the minuscule nature of sanctions embodied in the threat of shifting only costs, and the failure to allow the plaintiff to make an offer of judgment. Some states have attacked the problems of the Federal Rule by imposing a percentage of the settlement interest rate as a sanction for an offeree refusing to accept an offer that was more favorable than the actual judgment received.<sup>72</sup> Other states have imposed the requirement that a judgment be at least 120% of the offer in order to trigger the award of attorney's fees in addition to the amount of the final judgment.<sup>73</sup> For example, in order for an offeror to recover costs in Florida, the judgment obtained must be twenty-five percent greater than the

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*of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

<sup>68</sup> *See id.* at 1377. The authors identified those jurisdictions that replicate the federal rules by utilizing nine criteria, including whether the numbering and ordering of the state rules conforms to the federal model, and the extent to which the state rules have replicated important amendments to the Federal Rules. *See id.* at 1374-1375.

<sup>69</sup> *See id.* at 1377-1378.

<sup>70</sup> *See id.*

<sup>71</sup> A list of the offer of judgment provisions in each state is provided in Appendix A. The list reflects research through the summer of 1997.

<sup>72</sup> *See, e.g.*, ALASKA STAT. § 09.30.065 (Michie 1994); WIS. STAT. ANN. § 807.01(4) (West 1994); N.J. CT. R. 4:58-2 (West 1992).

<sup>73</sup> *See* N.J. CT. R. 4:58-2. This type of requirement would mitigate to some degree the harshness of the sanction because sanctions are not imposed until the recovery meets the percentage threshold.

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

offer if the plaintiff is to recover costs; or the judgment obtained must be twenty-five percent less than the offer, if the defendant is to recover costs.<sup>74</sup> Other states allowed plaintiffs to extend offers of judgments to defendants, triggering the same sanctions imposed on the plaintiff for rejecting a more favorable offer.<sup>75</sup>

Another issue regarding the effectiveness of an offer of judgment statute is whether the imposition of sanctions for rejection of a more favorable offer is mandatory by the language of the rule, or whether such sanctions are at the trial court's discretion based on its evaluation of the need for the sanction of attorney's fees on the particular facts of each case. The majority of state offer of judgment provisions provide that the sanctions imposed will be mandatory, not discretionary.<sup>76</sup> Florida's offer of judgment statute specifically illustrates this problem.<sup>77</sup> The statute itself lists factors a trial court must evaluate in determining whether an offer has been made in good faith. Any offer the court finds made in bad faith allows the trial judge to prohibit an award of costs and attorney's fees to the offeror. Potentially, provisions like Florida's will generate more litigation in cases where the propriety of the litigant's settlement is subjected to subsequent collateral litigation, even though the actual cause of action that gave rise to the controversy has been settled.

Innovation in offer of judgment procedures continues at the state level. Consider the example of Ohio, which is otherwise a replica state. The Ohio Rules of Civil Procedure do not provide for an award of costs when a plaintiff refuses to accept an offer that is more favorable than the eventual verdict.<sup>78</sup> Ohio Rule 68 itself does not limit the offer of judgment tactic, and the staff notes to Ohio Rule 68 encourage offers of settlement and voluntary resolution of litigation. However, the staff notes explicitly reject the federal approach of awarding costs to the defendant if the plaintiff rejects a more favorable offer than she receives at trial. Ohio rejected the

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<sup>74</sup> See FLA. STAT. ANN. § 768.79 (West 1994).

<sup>75</sup> See, e.g., ALASKA STAT. § 09.30.065 (Michie 1994); COLO. REV. STAT. ANN. § 13-17-202 (West 1994); FLA. STAT. ANN. § 768.79 (West 1994); WIS. STAT. ANN. § 807.01 (West 1994); ARIZ. R. CIV. P. 68 (1996); CAL. CIV. PROC. CODE § 998 (West 1993); N.J. CT. R. 4:58-2 (West 1992).

<sup>76</sup> See, e.g., COLO. REV. STAT. ANN. § 13-17-202 (West 1994); ALA. R. CIV. P. 68 (Michie 1996); ARIZ. R. CIV. P. 68 (1996); ARK. R. CIV. P. 68 (Michie 1997); CAL. CIV. PROC. CODE § 998 (West 1993); DEL. R. CIV. P. 68 ; HAW. R. CIV. P. 68.

<sup>77</sup> See FLA. STAT. ANN. § 768.79(7) (West 1994).

<sup>78</sup> See OHIO R. CIV. P. 68.

federal approach because the offer of judgment provision, as argued by the staff notes to Ohio Rule 68, too "often had a one-sided, coercive effect."<sup>79</sup> In light of this perceived coercive effect, the staff notes explicitly rejected adoption of Federal Rule 68 for use as a basis of a costs proceeding. Indeed, by adopting Ohio Rule 68, the Ohio Supreme Court effectively repealed former statutes that, analogous to Federal Rule 68, permitted the use of an offer of judgment by a defendant as a basis of a costs proceeding.<sup>80</sup>

The Rules Advisory Committee to the Ohio Supreme Court revisited the issue in 1996,<sup>81</sup> when the Court published for comment a revised Ohio Rule of Civil Procedure 68.<sup>82</sup> The proposal was quite similar to present Federal Rule 68, with the exception that it covered offers of judgment by plaintiffs or defendants.<sup>83</sup> If the plaintiff's unaccepted offer was more favorable than the relief obtained by the plaintiff at trial, then the plaintiff would be awarded double costs.<sup>84</sup> By its terms, the proposal did not apply to class action cases<sup>85</sup> or to claims for attorney's fees.<sup>86</sup>

The proposed Staff Note found that the original Staff Note's fear of a

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<sup>79</sup> OHIO R. CIV. P. 68 staff notes. Basically, use of the Ohio offer of judgment rule is nonexistent because the language of the Rule imposes no penalty on the offeree for rejecting an offer. *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> The Ohio Supreme Court is granted rulemaking authority by Article IV, Section 5(B) of the Ohio Constitution. The Ohio General Assembly has the option to veto proposed rules, somewhat similar to the federal system. Ordinarily, the Supreme Court only promulgates rules for consideration that have first been proposed by the Rules Advisory Committee to the Court. *See* SUP. CT. R. FOR THE GOVT. OF THE BAR OF OHIO XII (describing duties of the Rules Advisory Committee). *See generally* 4 STANLEY E. HARPER, JR. & MICHAEL E. SOLIMINE, ANDERSON'S OHIO CIVIL PRACTICE § 145.05 (1996) (describing the rulemaking process in Ohio).

During the period in question, Professor Solimine was counsel (i.e., the reporter) to the Civil Rules Subcommittee of the Rules Advisory Committee, and was involved in the drafting process for the proposed amendment to Ohio Rule 68. The discussions in this Article of that proposal are solely those of the authors and are not necessarily shared by the Committee or the Ohio Supreme Court.

<sup>82</sup> The proposal with an accompanying proposed staff note was published in 69 OHIO ST. BAR ASS'N. REP. xxxvii, xlv, xlvi, xlvii-xlix (Oct. 7, 1996), and is reprinted in full in Appendix B [hereinafter Proposed Staff Note].

<sup>83</sup> *See* Proposed OHIO R. CIV. P. 68(A)(1).

<sup>84</sup> *See* Proposed OHIO R. CIV. P. 68(A)(3).

<sup>85</sup> *See* Proposed OHIO R. CIV. P. 68(B)(1).

<sup>86</sup> *See* Proposed OHIO R. CIV. P. 68(B)(4).



## STATE COURT REGULATION OF OFFERS OF JUDGMENT

“one-sided coercive” effect was “difficult to measure” and often appeared “to be based almost wholly on anecdotal evidence.”<sup>87</sup> Given the possibility that some version of an offer of judgment rule can encourage settlements, the prior Ohio approach was rejected.<sup>88</sup> Unlike the present Federal Rule, the proposal governs offers by plaintiffs; if “the purpose of the rule is to reward parties who make unaccepted offers of judgment which end up being more favorable (to the nonaccepting party) than the relief awarded, then there seems no particular reason why plaintiffs’ offers should not be covered.”<sup>89</sup> Because prevailing plaintiffs would already be awarded costs,<sup>90</sup> doubling such costs would provide “an extra, but not extravagant, reward to the plaintiff” under these circumstances.<sup>91</sup>

With regard to the exceptions, class actions were excluded from coverage, because to permit, in effect, private settlement of such suits could conflict with the judicial duty to approve settlement of such actions.<sup>92</sup>

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<sup>87</sup> Proposed Staff Note, *supra* note 82, at xlvii.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.* at xlviii.

<sup>90</sup> See OHIO R. CIV. P. 54(D) which is substantively identical to FED. R. CIV. P. 54(d). Actually, award of costs under Federal Rule 54(d) and most of its state counterparts is discretionary, while the proposal in question makes the award mandatory. *See SHAPARD, supra* note 6, at 1 n.4.

<sup>91</sup> Proposed Staff Note, *supra* note 82, at xlviii. The Federal Judicial Center’s recent survey of attorneys on the use and effect of present Federal Rule 68 and its proposed modifications, indicated that attorneys supported—in lieu of or in addition to other modifications of Rule 68—an award of anywhere from twice to five times the amount of costs that otherwise would be given. *See SHAPARD, supra* note 6, at 52–53.

<sup>92</sup> *See* Proposed Staff Note, *supra* note 82, at xlvii (citing OHIO R. CIV. P. 23(E)). For the same reason, shareholder derivative suits were also excluded. *See id.* (citing OHIO R. CIV. P. 23.1). Present Federal Rule 68 has no such exclusion, and at least one court has stated that “in the context of class actions, Rule 68 offers of judgment are routinely employed despite the fact all agreements must subsequently be approved by the court after a fairness hearing.” *Gordon v. Gouline*, 81 F.3d 235, 239 (D.C. Cir. 1996). Nonetheless, we think the more prudent course is to exclude such cases from the coverage of the proposal because:

Rule 68 consequences do not seem appropriate if the offeree accepts the offer but the court refuses to approve settlement on that basis. It may be unfair to make an award against representative parties, and even more unfair to seek to reach nonparticipating class members. The risk of an award, moreover, may create a conflict of interest that chills efforts to represent the interests of others.

Cooper, *supra* note 6, at 146. *See also* 12 WRIGHT ET AL., *supra* note 10, § 3001.1, at

Referencing the controversy over the *Marek* case, the drafters of the proposal opted to exclude claims for the award of attorney's fees, finding persuasive the criticism of *Marek* that it created "a tension with the promotion of private enforcement of law embodied in a statutory fee shifting provision."<sup>93</sup>

During the comment period, the proposal received some support,<sup>94</sup> but generated vociferous opposition from the Ohio Academy of Trial Lawyers (OATL), a group of plaintiffs' attorneys.<sup>95</sup> They argued that the proposal was unnecessary, since there was purportedly no evidence of "an overabundance of unnecessary trials."<sup>96</sup> Moreover, they claimed, the proposal would have a chilling effect on plaintiffs, because "[n]o credible argument can be made . . . that personal injury or wrongful death plaintiffs

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76-77 (similar analysis).

<sup>93</sup> Proposed Staff Note, *supra* note 82, at xlix.

<sup>94</sup> See Letter from Judge John R. Moser to Keith Bartlett, Assistant Administrative Director, Supreme Court of Ohio 1 (Oct. 10, 1996) (supporting Rule 68 proposal and suggesting incentives in proposal not large enough) (on file with authors); Letter from Jerome C. Tinianow, Esq. to Keith Bartlett, Assistant Administrative Director, Supreme Court of Ohio 1-3 (Oct. 29, 1996) (advancing similar arguments) (on file with authors).

<sup>95</sup> OATL was founded in 1954 as an organization of attorneys who represent individual plaintiffs in personal injury and related cases. Current membership is 2,600 attorneys. See Richard Mason, *What is the Academy?*, OHIO L. W., Feb. 17, 1997, at 56. The organization has been active in the rulemaking process in Ohio. For example, OATL successfully opposed making Rule 11 of the Ohio Rules of Civil Procedure more like Rule 11 of the Federal Rules of Civil Procedure (as amended in 1983). See HARPER & SOLIMINE, *supra* note 81, § 151.23, at 320. It also successfully opposed curbing Rule 41(A)(1)(a) of the Ohio Rules of Civil Procedure (permitting plaintiffs to voluntarily dismiss suits without prejudice at any time prior to the commencement of trial), and making it more like Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure (which only permits such dismissals prior to service of an answer or a motion for summary judgment), by limiting such dismissals to at least five days before a scheduled trial date. See 5 MICHAEL E. SOLIMINE, ANDERSON'S OHIO CIVIL PRACTICE § 168.01, at 114-115 (1994). The organization also proposed an amendment to Ohio's discovery rules, requiring judges to monitor protective orders sealing settlement agreements and other material in a case. The Rules Advisory Committee did not recommend adopting the proposal and the Supreme Court took no further action on the matter. See *id.* at 159.11, at 16 n.74.

<sup>96</sup> Letter from Dale K. Perdue, President, Ohio Academy of Trial Lawyers to Keith T. Bartlett, Assistant Administrative Director, Supreme Court of Ohio 2 (Dec. 2, 1996) (on file with authors).

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

are on an equal footing with corporate defendants or the insurance companies that insure tortfeasors. The economic leverage—and hence the ability to tolerate risk—clearly rests with the latter.”<sup>97</sup> Shortly thereafter, the Ohio Supreme Court, without comment, withdrew the proposal from further consideration.<sup>98</sup>

### IV. LESSONS OF THE STATE EXPERIENCE WITH OFFERS OF JUDGMENT

Disparate though it is, we think the experience of the various states regarding the regulation of offers of judgment can inform debate within individual states and at the federal level. In effect, to use Justice Brandeis’ famous phrase, states can be seen as “laboratories of experimentation”<sup>99</sup> on

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<sup>97</sup> *Id.*

<sup>98</sup> See 70 OHIO ST. BAR ASS’N REP. xlvii (Feb. 3, 1997). One writer contacted the Justices of the Ohio Supreme Court after the withdrawal of the Rule 68 proposal:

Several justices did respond to inquiries regarding their position and indicated that the vote on the proposed amendment was a close one. One justice opined that a motivating factor in that justice’s opposition to the amendment was the greater disparity in bargaining power between state plaintiffs and defendants than in federal court.

Bell, *supra* note 9, at 16. The reasons advanced by the one justice are of interest, even though they were not advanced by the OATL. It is true that institutional differences between federal and state courts may induce certain types of litigants pursuing certain types of cases to choose one forum over the other. See generally Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961 (1995) (discussing various considerations that drive forum shopping). To our knowledge, however, there is little or no reliable empirical evidence that supports the generalization that there is “greater disparity in bargaining power between state plaintiffs and defendants than in federal court,” in Ohio or anywhere else. Cf. Carol R. Flango, *Caseload Burden in State and Federal Courts: Comparing State Court Tort and Contract Cases to Federal Diversity Cases*, 15 STATE CT. J. 10, 14 (Fall 1991) (presenting an empirical study of cases in various federal and state courts, including those in Cincinnati and Cleveland, Ohio, which indicated, inter alia, that individuals are more likely to sue other individuals in state court, while “individuals and corporations both tend to bring suits against corporations in federal court.”).

<sup>99</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). For critiques of the usefulness of this metaphor, see James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

the optimum type(s) of offer of judgment provisions.

The best evidence from the states would be a tightly controlled scientific experiment on the use and effect of one or more versions of Rule 68, or surveys of the present practices of attorneys in a given state.<sup>100</sup> Unfortunately, we are unaware of any such studies. The only one that, to our knowledge, comes close is Alaska's offer of judgment provision. Alaska is a replica state,<sup>101</sup> but its Rule 68 covers both plaintiffs and defendants and permits both costs and attorney's fees to be shifted.<sup>102</sup> A survey of attorneys in that state revealed that the Alaska provision did encourage parties, particularly plaintiffs, to settle.<sup>103</sup>

With regard to the other states, we can only infer how the provisions have operated. As has been noted, a curious feature of the diffusion of innovation<sup>104</sup> in this area is that the most populous states, save Ohio, are *not* Federal Rule replica states.<sup>105</sup> And of those states, several (California,

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<sup>100</sup> Cf. Thomas D. Rowe, Jr., *Empirical Research on Offer of Settlement Devices*, DUKE L. MAG., Spring 1996, at 13, 15 (calling for similar experimenting).

<sup>101</sup> See Oakley & Coon, *supra* note 67, at 1380.

<sup>102</sup> See ALASKA R. CIV. P. 68. For a discussion of this provision, see ALASKA JUDICIAL COUNCIL, ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES 68-69 (1995) [hereinafter Alaska Study]. Alaska is unique among the states in adopting a version of the English Rule on attorney's fees, where the losing party pays such fees to the opponent, as opposed to the American Rule, where absent statutory or contractual provision to the contrary, each party pays its own attorney's fees. See Susanne Di Pietro, *The English Rule at Work in Alaska*, 80 JUDICATURE 88 (1996).

<sup>103</sup> See Alaska Study, *supra* note 102, at 117-118. More specifically, the study found that "defendants found the offer of judgment provision created a strong incentive for plaintiffs to settle," and attorneys on both sides found the effect of Alaska Rule 68 accentuated by the fact of Alaska's adoption of the English Rule on attorney-fee shifting. *Id.* at 117 (footnote omitted). While plaintiffs made Rule 68 offers, the attorneys felt such "offers seemed to function more as negotiation tools and did not seem to be taken seriously as defendants' offers." *Id.* at 118.

<sup>104</sup> The seminal article on the diffusion of innovations among the states is Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969) (studying adoption by state legislatures). Such studies have been conducted on the adoption of doctrines by courts. See, e.g., Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981); Michael E. Solimine, *The Impact of Babcock v. Jackson: An Empirical Note*, 56 ALB. L. REV. 773 (1993).

<sup>105</sup> See Oakley & Coon, *supra* note 67, at 1425; Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence, and Emerging Procedural*

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

Florida and Texas) have innovative provisions that, among other things, permit both sides to offer judgments and shift more than costs under certain circumstances.<sup>106</sup> Had such provisions greatly and adversely impacted the settlement rate in general, or plaintiffs in particular, one might think that such circumstances would have gained more attention. The affected interest groups in those states, one might think, would expend political capital to repeal purportedly onerous provisions.<sup>107</sup> Interest group impact on rulemaking for courts appears to be increasing, at least at the federal level,<sup>108</sup> and the experience from Ohio described before suggests that such groups will not ignore offer of judgment provisions.

In the absence of more empirical evidence from each state we advance these conclusions with much hesitation. But we think federal (and state) rule-makers can and should draw on this experience. Many of the Federal Rules themselves, of course, were modeled after state procedural rules,<sup>109</sup> and even today some amendments to the Federal Rules have their genesis, at least in part, on the state experience.<sup>110</sup> In this light, we now review three current proposals to amend Federal Rule 68.

### A. Judge William Schwarzer's Proposal

In his proposed revision of the federal offer of judgment provision, United States District Judge William Schwarzer makes available the offer of judgment tactic to the plaintiff as well as the defendant.<sup>111</sup> His version of

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*Patterns*, 137 U. PA. L. REV. 1999, 2029–2030 (1989). To our knowledge, there is no study applying the diffusion of innovation literature to the adoption of the Federal Rules of Civil Procedure by the states. See *supra* note 104.

<sup>106</sup> These provisions are listed and briefly described in Appendix A.

<sup>107</sup> Many procedural rules do not generate such activity, because they “do not further the goals of strong interest groups because they do not systemically or predictably affect the outcomes of categories of cases.” Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 149 (1996) (footnote omitted). But controversial procedural rules, like offer of judgment provisions, provide an exception. See *id.* at 149 n.63.

<sup>108</sup> See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

<sup>109</sup> See RICHARD L. MARCUS, ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 118 (2d ed. 1995) (noting the influence of Field Code on the Federal Rules of Civil Procedure).

<sup>110</sup> See Subrin, *supra* note 105, at 2045.

<sup>111</sup> See William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to*

Rule 68 would also impose reasonable attorney's fees and costs on the offeree who rejected an offer more favorable than the eventual judgment. His proposal, however, would limit the award of attorney's fees to the extent necessary to "make the offeror whole" for the costs incurred after the rejection of the offer; and Judge Schwarzer explicitly limits the award of costs and attorney's fees to the amount of judgment obtained. Judge Schwarzer's proposed amendment also vests discretion with the court to reduce an award of costs and attorney's fees in order to avoid an imposition of undue hardship on a party. With respect to the claim involving injunctive or equitable relief, the proposed amendment would compare the judgment obtained and the offer only when the terms of the offer include all such nonmonetary relief. Furthermore, Judge Schwarzer argues that the revised rule's incentive structure, based on the imposition of risks on the parties, is sufficiently limited by the make whole and capping restrictions.<sup>112</sup> These risks are eliminated, Judge Schwarzer posits, because no costs are recoverable when judgment is for the defendant, and neither side can expect to recover disproportionate attorney's fees and costs.

In articulating his proposal, Judge Schwarzer argues that his provision answers the widespread criticisms of the 1983 and 1984 proposals. Specifically, he posits that the proposed revision does not threaten plaintiffs with out-of-pocket expenses.<sup>113</sup> Furthermore, the provision does not undercut the policy of fee-shifting statutes, unlike the *Marek* decision, which held that Rule 68 could bar an award of statutory attorney's fees to a prevailing civil rights party plaintiff who had rejected a settlement offer that exceeded the judgment.<sup>114</sup> Furthermore, the proposal does not permit windfall recoveries or recovery of disproportionate costs. Finally, Judge Schwarzer argues that the proposed revision eliminates the need for judicial review of the reasonableness of offers and rejections, although he acknowledges that the trial court is vested with discretion to determine whether the sanction of attorney's fees is appropriate in the case where imposition of fees would not cause undue hardship.<sup>115</sup>

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*Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

<sup>112</sup> See *id.* at 150.

<sup>113</sup> See *id.* at 152.

<sup>114</sup> See *id.* at 157. Judge Schwarzer would exclude civil rights and antitrust laws to avoid undercutting the congressional policy encouraging private enforcement of these statutory provisions.

<sup>115</sup> See *id.* at 152.

*B. The Civil Rules Advisory Committee, Again*

In the mid-1990s, the Federal Civil Rules Advisory Committee attempted to once again address the problems inherent in Federal Rule 68.<sup>116</sup> The Committee Note to the new Rule 68 proposal begins with the declaration that Federal Rule 68 “has been properly criticized as one-sided and largely ineffectual,” providing little inducement to make or accept offers because the penalty in most cases typically includes only trivial taxable costs.<sup>117</sup> The Committee also acknowledges the concerns and criticisms of the prior proposed amendments, and attempts to correct the perceived deficiencies contained in the 1983 and 1984 proposals, based on Judge Schwarzer’s revisions and submission of an amended Rule 68.<sup>118</sup>

The proposed rule allows any party to make a Rule 68 offer. Amended Rule 68(e) also provides that where the final judgment is less favorable to the offeree than the offer, the offeree must pay a sanction to the offeror.<sup>119</sup> The penalty imposed on the offeree consists of costs incurred by the offeror after the offer expired and reasonable attorney’s fees incurred by the offeror after the offer expired. This remedy is subject to two limitations: (1) the amount of post-offer attorney’s fees is reduced by the difference between the judgment; and (2) the offer and the attorney fee award cannot exceed the amount of the judgment.<sup>120</sup> A plaintiff who wins nothing pays no attorney’s fees, and a defendant pays no more in fees than the amount of the judgment. In addition to requiring the attorney’s fees to be reasonable, the proposal also vests the trial court with discretion to reduce the sanction to avoid undue hardship or reasonable surprise, even to the point of denying any award to the offeror.<sup>121</sup>

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<sup>116</sup> The proposed rule and advisory committee’s note are reprinted in Cooper, *supra* note 6, at 135–147.

<sup>117</sup> *See id.* at 138. Although the Advisory Committee recognized that the *Marek* decision significantly increased the incentive in cases involving statutes that authorized attorney’s fees as part of the plaintiff’s recovery, the Committee acknowledged the criticism of the *Marek* decision as inconsistent with statutory policies that specifically favored special categories of claims that countenanced the right to recover fees.

<sup>118</sup> *See id.* The advisory committee’s note expressly cited Judge Schwarzer’s proposed revision as the basis for many of the changes in the 1993 amendment. *See id.*

<sup>119</sup> However, an offeree who is statutorily entitled to an award of attorney’s fees is immune from the sanction of attorney’s fees. *See id.* The advisory committee’s note would overturn the *Marek* Court’s interpretation of Rule 68. *See id.* at 141. The Committee rejects the award of attorney’s fees against a party entitled to recover statutory fees because the sanction could interfere with the legislative determination that

*C. ABA Proposal*<sup>122</sup>

The House of Delegates of the American Bar Association (ABA) has responded to concerns for reformation of civil justice by advocating the retooling of current offer of judgment procedures instead of rushing to adopt the "English" rule.<sup>123</sup> The ABA proposal represents a self-described compromise between the draconian loser pays position and the present Federal Rule 68.<sup>124</sup> The measure also reflects a compromise between the pro-plaintiff Section of Litigation and the generally pro-defendant Section of Tort and Insurance Practice.<sup>125</sup> In its proposal, the ABA cites the need for plaintiffs to be able to invoke the offer of judgment tactic, while also providing an incentive to settle by imposing attorney's fees as well as costs, whereby limiting the operation of cost shifting by introducing a 25% margin of error.

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the underlying claim deserves special protection. *See id.* at 144.

<sup>120</sup> *See* Cooper, *supra* note 6, at 136–137 (proposed FED. R. CIV. P. 68(e)).

<sup>121</sup> *See id.* at 143–144. An example of extreme or undue hardship would be the case where a severely injured plaintiff rejected a \$100,000 offer and was subsequently awarded that amount while the offeror incurred \$100,000 worth of fees. The Advisory Committee states that "[a] fee award that would wipe out any recovery by the plaintiff could be found unfair." *Id.* Similarly, surprise would most likely be found when the law has changed between the time an offer expired and the time of the judgment.

<sup>122</sup> *ABA Urges Offer of Judgment Changes to Counter Movement to "Loser Pays" Rule*, 64 U.S.L.W. 2495 (1996).

<sup>123</sup> *See id.* at 2495. The final vote of the delegates was almost evenly divided on the issue with 202 votes endorsing the new proposal and 188 votes in favor of the status quo. *See id.*

<sup>124</sup> *See id.* The new proposal represents a "compromise to address the concerns raised by the loser pays proponents" as well as recently enacted loser pays bills and pending loser pays legislation in several other states. *See id.* One of the proposal's promoters states that the ABA's offer of judgment revision represents "the most benign and most practical" alternative to the loser pays bills. *See id.*

<sup>125</sup> *See id.*



## STATE COURT REGULATION OF OFFERS OF JUDGMENT

The proposed measure allows plaintiffs as well as defendants to make offers of judgment. Furthermore, the offeree who rejects a more favorable offer than she receives at trial must pay the offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses incurred after the date of the offer.<sup>126</sup> However, this penalty provision does not operate to shift costs to the offeree unless the final judgment is greater than 125% of the amount of the offer.<sup>127</sup> Similarly, an offeror cannot recover costs unless the final judgment obtained is less than 75% of the amount of the offer.<sup>128</sup> The proposal specifically limits the fee award to the amount of the judgment and exempts from its fee-shifting provisions causes of action which contemplate attorney's fees as part of a remedy.<sup>129</sup>

The ABA proposal has several equitable limiters that prevent harsh imposition of the penalty provision. First, the court may reduce or eliminate the amount to be shifted under the rule to avoid hardship, to uphold the interest of justice, or to satisfy any other compelling reason.<sup>130</sup> Next, as in Judge Schwarzer's proposed revision, the amount of any attorney's fees "may not exceed the actual amount of fees incurred by the offeree after the date of the offer."<sup>131</sup> Finally, like the proposed Ohio Rule 68, any party may, at any time after the commencement of the action, seek a court ruling that the offer of judgment procedure does not apply to the proceeding.

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<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *See id.* The amount of the fee award may not exceed the total money amount of the money judgment. *See id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See id.* The ABA defines a compelling reason as one "that justifies the offeree party in having sought a judicial resolution of the suit rather than accepting the offer of judgment." *Id.*

<sup>131</sup> *Id.*

### D. *The Ohio Proposal*

The offer of judgment rule considered by the Ohio Supreme Court in 1996 has already been described.<sup>132</sup> It resembles in some ways the three proposals just described (notably by permitting all parties to make offers),<sup>133</sup> but differs in more dramatic ways. The Ohio proposal disclaims any effort to shift attorney's fees under any circumstances and vests no discretion in the trial court to engage in an ex post facto evaluation of the reasonableness of offers made. It is, then, much shorter and simpler than the other proposals. But these are substantive virtues, and make it more likely that something like the Ohio proposal will serve as a model to survive the political gauntlet toward approval.

Recognizing and indeed agreeing with the critics of *Marek*, the Ohio proposal does not cover cases involving fee-shifting statutes, nor does it attempt to shift fees at all.<sup>134</sup> *Marek* has few if any defenders; thus it is not difficult to defend excluding fee-shifting statutes from the operation of the rule. More problematic is eschewing any fee-shifting at all to reward certain offers of judgment. As Professor Edward Cooper has observed, shifting attorney's fees in offer of judgment proposals is a "lightning rod for controversy," perhaps fueled by the "emotional support" for the American rule on such fees.<sup>135</sup> Given that controversy, coupled with the uncertainties of the effect of shifting such fees,<sup>136</sup> we think any realistic proposal should, as an incremental first step, leave out the shifting of such fees.<sup>137</sup> Likewise, the Ohio proposal uses the bright line test of awarding costs to defendants, or double costs to plaintiffs. The complications for both judges and practitioners in other proposals are excluded. The sheer complexity of the proposals may deter their use,<sup>138</sup> and no doubt lead to collateral litigation.

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<sup>132</sup> See *supra* notes 78–98 and accompanying text.

<sup>133</sup> To our knowledge no one has seriously argued that offer of judgment provisions should be restricted to those made by defendants. Why the present Federal Rule is drafted this way is unclear. Cf. WRIGHT ET AL., *supra* note 10, § 3001, at 67 (praising the rule as drafted by providing no specific defense of restriction to defendants' offers).

<sup>134</sup> By the same token, the Ohio proposal does not purport to overrule *Marek* (at the state level) by defining costs to exclude attorney's fees. The most recent Advisory Committee proposal does just that. See Cooper, *supra* note 6, at 117, 141.

<sup>135</sup> *Id.* at 110.

<sup>136</sup> See *supra* notes 58–66 and accompanying text (summarizing economic and

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

No doubt, this proposal can be criticized as being too weak.<sup>139</sup> It is common ground that the present Federal Rule is rarely used because court costs are typically quite modest and thus provide little incentive (or disincentive) even when shifted.<sup>140</sup> Doubling such costs as under the proposal perhaps will not make much difference, but we think it is a modest first step which will encourage settlement.

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empirical literature on Rule 68).

<sup>137</sup> See also LARRY KRAMER, *Rule 68 and Settlement Dynamics*, in REFORMING THE CIVIL JUSTICE SYSTEM, *supra* note 6, at 154–155 (arguing that any revised Rule 68 should not shift attorney's fees).

<sup>138</sup> See Cooper, *supra* note 6, at 113 n.6. Present Rule 68 seems complicated enough as it is. Most of the proposed amendments to the Rule would address issues not in the present Rule like successive offers, the effect of nonmonetary relief and the effect of multiple parties. See *id.* at 135–137 (reprinting most recent proposal of Federal Rules Advisory Committee).

<sup>139</sup> We can easily dispose of the opposite reasons against the Ohio proposal advanced by the OATL. See *supra* notes 95–97 and accompanying text. Whether there is an “overabundance of unnecessary trials,” in Ohio or elsewhere, is certainly open to empirical debate. See *supra* note 96; see also Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996). But that is not the basis of the proposal, which is simply to encourage settlement of all civil litigation. Likewise, the OATL letter is devoid of any reference to empirical sources which would substantiate its charge that the proposal would adversely impact plaintiffs. The charge is especially unpersuasive given that the proposal covers offers by plaintiffs as well, excludes claims brought under a fee-shifting statute and does not shift fees at all. See also Bell, *supra* note 9, at 16 (discussing and supporting the Ohio proposal).

<sup>140</sup> See, e.g., POSNER, *supra* note 59, at 575 n.2; Rowe with Vidmar, *supra* note 61, at 14; Schwarzer, *supra* note 111, at 149.

## V. CONCLUSION

The numerous, failed efforts to amend Federal Rule 68 grew out of renewed efforts by policymakers in the 1980s and 1990s to encourage alternative dispute resolution and greater judicial control over the management of litigation.<sup>141</sup> Those efforts have failed, largely due, we think, to the complexity of the numerous proposals, uncertainty as to how they would operate and the perception—rightly or wrongly—that many of the proposals would operate adversely to plaintiffs.<sup>142</sup>

Despite the gridlock at the federal level, rulemakers in many state courts have not been reticent about pursuing innovations in regulating and encouraging offers of judgment. This largely unexamined experimentation<sup>143</sup> is a potentially rich source of experience that could inform rulemaking at both the federal level, and in those states that have only replicated Federal Rule 68, or have no offer of judgment provision at all. Modest proposals like that considered in Ohio in 1996 are an appropriate first step to enliven the use of offers of judgment.

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<sup>141</sup> See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicating Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 728 n.251 (1993) (placing proposals to amend Rule 68 in larger context of procedural reform and efforts to adopt some form of attorney-fee shifting).

<sup>142</sup> See Subrin, *supra* note 105, at 2043 n.225.

<sup>143</sup> Such experimentation could take place (and perhaps already is) in diversity litigation in federal court. See, e.g., *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 60 F.3d 305 (7th Cir. 1995) (applying Wisconsin offer of judgment statute in diversity case). See generally 12 WRIGHT ET AL., *supra* note 10, § 3001.2, at 80-89 (discussing application of state offer of judgment provisions in federal court).

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

### APPENDIX A—STATE OFFER OF JUDGMENT PROVISIONS

Alabama: ALA. R. CIV. P. 68 (Michie 1996) (like Fed. R. Civ. P. 68).

Alaska: ALASKA R. CIV. P. 68 & ALASKA STAT. § 09.30.065 (Michie 1996) (both sides can make offer; interest on judgment increased or decreased under certain circumstances).

Arizona: ARIZ. R. CIV. P. 68 (1996) (both sides can make offer; reasonable expert witness fees and double taxable costs awardable).

Arkansas: ARK. R. CIV. P. 68 (Michie 1997) (like Fed. R. Civ. P. 68; costs defined to exclude attorney's fees).

California: CAL. CIV. PROC. CODE § 998 (West 1993) (both sides can make offer).

Colorado: COLO. REV. STAT. ANN. § 13-17-202 (West 1996) (both sides can make offer).

Connecticut: CONN. GEN. STAT. ANN. § 52-195 (West 1997) (both sides can make offer).

Delaware: DEL. SUPER. CT. 68 (like FED. R. CIV. P. 68).

District of Columbia: D.C. SUPER. CT. R. CIV. P. 68 (like FED. R. CIV. P. 68).

Florida: FLA. STAT. ANN. § 768.79 (West 1997) (both sides can make offer; attorney's fees can be shifted under certain circumstances).

Georgia: no apparent provision.

Hawaii: HAW. R. CIV. P. 68 (like FED. R. CIV. P. 68).

Idaho: IDAHO R. CIV. P. 68 (like FED. R. CIV. P. 68; can include attorney's fees).

Illinois: no apparent provision.

Indiana: IND. R. TRIAL P. 68 (West 1996) (like FED. R. CIV. P. 68).

Iowa: 1997 IOWA R. CIV. P. 68 (West) (like FED. R. CIV. P. 68).

Kansas: KAN. STAT. ANN. § 60-2002(b) (1994) (like FED. R. CIV. P. 68).

Kentucky: KY. R. CIV. P. 68 (Michie 1997) (like FED. R. CIV. P. 68).

Louisiana: no apparent provision.

Maine: ME. R. CIV. P. 68 (West 1996) (like FED. R. CIV. P. 68).

Maryland: no apparent provision.

Massachusetts: MASS. R. CIV. P. 68 (West 1992) (like FED. R. CIV. P. 68).

Michigan: MICH. R. CT. 2.405 (1994) (both sides can make offer; costs and attorney's fees shifted under certain circumstances).

Minnesota: MINN. R. CIV. P. 68 (both sides can make offer; attorney's fees shifted under certain circumstances).

Mississippi: MISS. R. CIV. P. 68 (1997) (like FED. R. CIV. P. 68).

Missouri: no apparent provision.

Montana: MONT. CODE ANN. § 25-20 (1993), Rule 68 (like FED. R. CIV. P. 68).

Nebraska: NEB. REV. STAT. § 25-901 (1997) (like FED. R. CIV. P. 68).

Nevada: NEV. R. CIV. P. 68 (1995) (both sides can make offer; attorney's fees shifted under certain circumstances).

New Hampshire: no apparent provision.

New Jersey: N.J. CT. R. 4:58 (West 1992) (both sides can make offer).

New Mexico: N.M. DIST. CT. R. CIV. P. 1-068 (like FED. R. CIV. P. 68).

New York: N.Y. C.P.L.R. 3221 (McKinney 1992) (like FED. R. CIV. P. 68).

North Carolina: N.C. GEN. STAT. § 1A-1 (1997), Rule 68 (like FED. R. CIV. P. 68).

North Dakota: N.D. R. CIV. P. 68 (1996) (both sides can make offer).

Ohio: OHIO R. CIV. P. 68 (Anderson 1996) (expressly forbids cost shifting).

Oklahoma: OKLA. STAT. ANN. tit. 12, §§ 940, 1101 (West 1997) (like FED. R. CIV. P. 68).

Oregon: OR. R. CIV. P. 54(E) (1988) (like FED. R. CIV. P. 68).

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

Pennsylvania: PA. R. CIV. P. 238 (West 1988) (limits offers to defendants, but provides enhanced prejudgment interest to certain plaintiffs who prevail at trial).

Rhode Island: R.I. R. CIV. P. 68 (1992) (like FED. R. CIV. P. 68).

South Carolina: S.C. CODE ANN. R. CIV. P. 68 (Law Co-op 1975) (like FED. R. CIV. P. 68; defendant can also recover costs when plaintiff fails to obtain any judgment at trial).

South Dakota: S.D. CODIFIED LAWS § 15-6-68 (Michie 1997) (like FED. R. CIV. P. 68).

Tennessee: TENN. CIV. P. R. 68 (1994) (like FED. R. CIV. P. 68).

Texas: no apparent provision.

Utah: UTAH R. CIV. P. 68 (1997) (like FED. R. CIV. P. 68).

Vermont: VT. R. CIV. P. 68 (1997) (like FED. R. CIV. P. 68).

Virginia: no apparent provision.

Washington: WASH. R. CIV. P. 68 (West 1996) (like FED. R. CIV. P. 68).

West Virginia: W. VA. R. CIV. P. 68 (Michie 1997) (like FED. R. CIV. P. 68).

Wisconsin: WIS. STAT. ANN. § 807.01 (West 1995) (both sides can make offer; costs and 12% interest on judgment can be shifted).

Wyoming: WYO. R. CIV. P. 68 (like FED. R. CIV. P. 68).

APPENDIX B—PROPOSED AMENDMENT TO OHIO RULE OF CIVIL  
PROCEDURE

RULE 68. Offer of Judgment

~~An offer of judgment by any party, if refused by an opposite party, may not be filed with the court by the offering party for purposes of proceeding to determine costs.~~

~~This rule shall not be construed as limiting voluntary offers of settlement made by any party.~~

(A) GENERAL PROVISIONS.

(1) AT ANY TIME MORE THAN THIRTY DAYS BEFORE THE TRIAL BEGINS, OR ANY ADDITIONAL OR LESSER TIME AS THE COURT ALLOWS, ANY PARTY MAY SERVE UPON THE ADVERSE PARTY A WRITTEN OFFER TO ALLOW JUDGMENT TO BE ENTERED FOR THE MONEY OR PROPERTY OR TO THE EFFECT SPECIFIED IN THE OFFER, WITH COSTS THEN ACCRUED. IF WITHIN THIRTY DAYS AFTER THE SERVICE OF THE OFFER, OR ANY ADDITIONAL OR LESSER TIME AS THE COURT ALLOWS, THE ADVERSE PARTY SERVES WRITTEN NOTICE THAT THE OFFER IS ACCEPTED, EITHER PARTY MAY THEN FILE THE OFFER AND NOTICE OF ACCEPTANCE TOGETHER WITH PROOF OF SERVICE OF THE OFFER AND NOTICE. THE COURT SHALL ENTER JUDGMENT UNDER CIV. R. 58. AN OFFER NOT ACCEPTED SHALL BE CONSIDERED WITHDRAWN AND EVIDENCE OF THE OFFER IS NOT ADMISSIBLE EXCEPT IN A PROCEEDING TO DETERMINE COSTS.

(2) IF THE JUDGMENT FINALLY OBTAINED BY THE PARTY SEEKING RELIEF IS NOT MORE FAVORABLE THAN AN OFFER BY THE PARTY AGAINST WHOM RELIEF IS SOUGHT, THE OFFEREE MUST PAY THE COSTS INCURRED BY THE OFFEROR AFTER THE MAKING OF THE OFFER.



**STATE COURT REGULATION OF OFFERS OF JUDGMENT**

(3) IF THE JUDGMENT FINALLY OBTAINED BY THE PARTY SEEKING RELIEF IS NOT LESS FAVORABLE THAN AN OFFER MADE BY THAT PARTY, THE OFFEREE MUST PAY DOUBLE THE COSTS INCURRED BY THE OFFEROR AFTER THE MAKING OF THE OFFER.

(4) THE FACT THAT AN OFFER IS MADE BUT NOT ACCEPTED DOES NOT PRECLUDE SERVICE OF A SUBSEQUENT WRITTEN OFFER, WITHIN THE TIME LIMITS SET IN THIS RULE.

(5) WHEN THE LIABILITY OF ONE PARTY TO ANOTHER HAS BEEN DETERMINED BY VERDICT OR ORDER OR JUDGMENT, BUT THE AMOUNT OR EXTENT OF THE LIABILITY REMAINS TO BE DETERMINED BY FURTHER PROCEEDINGS, ANY PARTY MAY MAKE AN OFFER OF JUDGMENT, WHICH SHALL HAVE THE SAME EFFECT AS AN OFFER MADE BEFORE TRIAL IF IT IS SERVED WITHIN A REASONABLE TIME NOT LESS THAN TEN DAYS, OR ANY ADDITIONAL OR LESSER TIME AS THE COURT ALLOWS, PRIOR TO THE COMMENCEMENT OF HEARINGS TO DETERMINE THE AMOUNT OR EXTENT OF LIABILITY.

**(B) EXCEPTIONS.** THIS RULE SHALL NOT APPLY TO ANY OF THE FOLLOWING:

(1) CLASS OR DERIVATIVE ACTIONS BROUGHT UNDER CIV. R. 23 OR CIV. R. 23.1;

(2) JUVENILE AND DOMESTIC RELATIONS PROCEEDINGS;

(3) PROBATE PROCEEDINGS, TO THE EXTENT THE RULE IS CLEARLY INAPPLICABLE TO PROBATE PROCEEDINGS;

(4) CLAIMS FOR ATTORNEY'S FEES THAT MAY BE AWARDED IN THE ACTION.

**Proposed Staff Note (effective July 1, 1997 Amendment)****Rule 68(A) General Provisions.**

The amendment considerably changes Rule 68 of the Ohio Rules of Civil Procedure [hereinafter Ohio Rule 68], and makes it very similar to Rule 68 of the Federal Rules of Civil Procedure [hereinafter Federal Rule 68], with one important difference: unlike the federal rule, Ohio Rule 68 encompasses offers of judgment by both plaintiffs and defendants.

When the Ohio Rules of Civil Procedure were first promulgated, the Federal Rules were generally used as a model. Ohio Rule 68 was one of those rules where the model was not followed. Unlike the federal rule, Ohio Rule 68 permitted offers of judgment to be made, but stated that the offer "may not be filed with the court by the offering party for purposes of a proceeding to determine costs." The Staff Note indicated that the federal model was not followed because the "use of offers of judgment as the basis of costs proceedings has in the past often had a one-sided, coercive effect." Whatever the truth of this statement at the time it was made, over two decades ago, the subject deserves revisiting.

Due to the crowded civil dockets of courts, coupled with the growing recognition that voluntary settlements often lead to better outcomes than the zero-sum game of contested litigation, a renewed emphasis on encouraging settlement has occurred over the past two decades in Ohio. One way to achieve that objective is to follow Federal Rule 68, which encourages pre-trial offers of judgment to be made. The possible "coercive" effects of Federal Rule 68 are difficult to measure and often appear to be based almost wholly on anecdotal evidence. Studies of the issue do not reveal compelling evidence of coercive effect. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 574-576 (4th ed. 1992); Thomas D. Rowe, Jr. with Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 *LAW & CONTEMP. PROBS.* 13 (1988); William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 *JUDICATURE* 147 (1992). *Cf.* David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 *J. LEGAL STUD.* 225 (1994) (reviewing theoretical and empirical studies of Federal Rule 68 and proposed alternatives to that rule).

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

For these reasons, the amendment to Ohio Rule 68 largely tracks the federal rule. There are some differences. To avoid confusion, the amendment is limited to *written* offers of judgment. While, in general, offers of judgment are to be made thirty days before trial (unlike ten days in the federal rule), the amendment grants discretion to the trial court to enlarge or shorten that period. And while the issue has been the source of some confusion in the federal courts, it should be clear that the word “costs” in the amendment does not include attorney’s fees. Thus, costs would be restricted to those awardable under Civ. R. 54(D), which Ohio law holds does not include attorney’s fees, unless a statute specifically states otherwise. *See Muze v. Mayfield*, 573 N.E.2d 1076 (Ohio 1991).

The major difference from Federal Rule 68 is that the amendment covers offers of judgment made by any party. Because the purpose of the rule is to reward parties who make unaccepted offers of judgment which end up being more favorable (to the nonaccepting party) than the relief awarded, there seems no particular reason why plaintiffs’ offers should not be covered. The federal rule only covers offers by defendants. The problem with including plaintiffs is that prevailing plaintiffs are eligible to be awarded costs, anyway, under Ohio Rule 54(D). That is not true, of course, with regard to nonprevailing defendants who nonetheless made unaccepted offers of judgment which are more favorable than the relief actually obtained by the plaintiffs.

Thus, greater and different incentives need be built into the rule to reward plaintiffs in these situations. *See* Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 123–125 (1986); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1985). To solve this problem, some states, in their versions of Federal Rule 68, have permitted any party to make and file an offer of judgment and provide extra rewards, in certain circumstances, to a plaintiff that makes an offer. *See, e.g.*, CONN. GEN. STAT. § 52–192a(b) (12% interest added to award); FLA. STAT. ANN. § 768.79(b) (attorney’s fees awardable under certain circumstances); N.J. REV. STAT. § 4:58–2 (8% interest added); WIS. STAT. § 807.01(3) (all costs doubled for plaintiff); ARIZ. R. CIV. P. 68(d) (double costs and expert witness fees awarded to either side); CAL. CIV. PROC. CODE § 998(d) (expert witness fees). The amendment follows the straight forward approach of permitting plaintiffs to recover double costs from the time the offer is made. This provides an extra, but not extravagant, reward to the plaintiff, beyond costs which would be recoverable in any event under Ohio Rule 54(D).

Finally, it is anticipated that the cost-shifting provision of the rule would apply even if nonmonetary relief is sought, in whole or in part. If the judgment obtained includes nonmonetary relief, a determination that it is more favorable to the offeree than was the offer shall be made only when the terms of the offer include all such nonmonetary relief. *See* Schwarzer, at 151-152.

### **Rule 68(B) Exceptions.**

Expressly excluded from the coverage of the rule are several categories of cases to which application of offers of judgment would be unsuitable. *See* OHIO R. CIV. P. 1(C) (listing other exceptions to the application of the Civil Rules).

Division (B)(1) excludes class actions brought under Ohio Civil Rule 23 or derivative suits brought under Ohio Civil Rule 23.1. In both those instances the court must approve a settlement. *See* OHIO R. CIV. P. 23(E); OHIO R. CIV. P. 23.1. To permit unapproved offers of judgment to be operative to shift fees would conflict with the judicial duty to oversee settlements in these cases.

Division (B)(2) excludes cases in juvenile or domestic relations courts, where the offer of judgment procedure appears not to be appropriate in any circumstance.

Division (B)(3) excludes only those cases in probate courts where the rule is clearly inapplicable. The rule may have some relevance in will contests and complaints for concealment of assets, among other things.

Finally, Division (B)(4) excludes claims where attorney's fees may be awarded in the action, including but not necessarily limited to cases brought under statutes which permit a prevailing party to recover attorney's fees. It is well settled under Ohio law both that (a) costs do not include attorney's fees, unless a statute specifically states to the contrary, *see, e.g., Muze v. Mayfield, supra*, and (b) the American Rule on attorney's fees is followed, meaning that such fees are ordinarily not recoverable in the absence of a fee-shifting statute or a contractual provision providing therefor, *see, e.g., Nottingdale Homeowners' Ass'n, Inc. v. Darby*, 514 N.E.2d 702 (Ohio 1987). To permit an Ohio Rule 68 proceeding to prevent a plaintiff prevailing under such a statute, who had rejected a settlement offer that exceeded a judgment, from collecting attorney's fees would undercut the presumed policy of the General Assembly to encourage private enforcement of attorney's fees statutes.

## STATE COURT REGULATION OF OFFERS OF JUDGMENT

This position is arguably in conflict with the United States Supreme Court's interpretation of Federal Rule 68 in *Marek v. Chesny*, 473 U.S. 1 (1985). There, the majority of the Court held that Federal Rule 68 could bar an award of statutory attorney's fees to a prevailing civil rights plaintiff who had rejected a settlement offer that exceeded the judgment. Whatever the merits of this decision, it creates a tension with the promotion of private enforcement of law embodied in a statutory fee-shifting provision. See *Chesny v. Marek*, 720 F.2d 474, 478-479 (7th Cir. 1983) (Posner, J.), *rev'd* 473 U.S. 1 (1985); see also *Marek v. Chesny*, 473 U.S. at 28-35 (Brennan, J., dissenting). More importantly, the *Marek* decision appears to conflict with Ohio cases which clearly differentiate attorney's fees from costs; the former is not subsumed in the latter. Cf. *Boltz & Odegaard v. Hohn*, 714 P.2d 854, 858 (Ariz. Ct. App. 1985) (declining to follow *Marek* in the interpretation of Arizona's offer of judgment rule, given "the clear position the Arizona courts have taken that attorney's fees are not costs").

In addition, the exception only departs from *Marek* with respect to attorney's fees. A plaintiff still can be prevented from recovering costs in an action brought under a statute with an attorney's-fee shifting mechanism, and attorney's fees could be recovered if the parties by prior agreement provided for recovery of attorney's fees by a prevailing party. See, e.g., *Nottingdale Homeowners' Ass'n, Inc.*, *supra*; Schwarzer, at 152. Conversely, a defendant would not be able to recover attorney's fees unless the statute defined defendants to be prevailing parties for the purpose of recovering attorney's fees. Cf. *Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987). Finally, outside the boundaries of Ohio Rule 68, parties are entirely free to reach a settlement on all aspects of a case, including the issue of attorney's fees.

